Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matters of	)	
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Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WT Docket No. 17-79
	)	
Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WC Docket No. 17-84

COMMENTS OF
CITYSCAPE CONSULTANTS, INC.

Cityscape Consultants, Inc. ("CCI")[1] submits these comments in response to the Commission's *Notice of Proposed Rulemaking and Notice of Inquiry*[2] ("*Wireless NPRM*") and its *Notice of Proposed Rulemaking, Notice of Inquiry and Request for Comment*[3] ("*Wireline NPRM*").

The *Wireless NPRM* invites comments, in paragraphs 4 through 22, on a variety of proposed rules and regulations applicable to local government's processing of wireless siting applications. Most of the proposals track prior Commission action, particularly action taken in the *2009 Shot Clock Ruling*[4] and the *2014 Infrastructure Report and Order*[5]. Generally, CCI has no objection to the proposals such as converting the rebuttable presumption relative to missing a shot clock deadline into an irrebuttable presumption that the time frames in question are reasonable. However, regulations both passed and pending by a number of state legislatures at the behest of the infrastructure industry have created a panoply of "deadlines" depending on type and location of

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[1] CCI is a full service telecommunications consulting firm which represents solely public sector clients, including local governments, on wireless siting issues. The comments expressed herein represent those solely of CCI principals and staff and do not necessarily reflect the views or opinions of any of its clients.

[2] *Notice of Proposed Rulemaking &Notice of Inquiry* in WT Docket No. 17-79 (rel. April 21, 2017)("*Wireless NPRM*")

[3] *Notice of Proposed Rulemaking, Notice of Inquiry and Request for Comment* in WT Docket No. 17-84 (rel. April 21, 2017)("*Wireline NPRM*")

[4] *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd 13994 (2009) (*2009 Shot Clock Ruling*), *aff'd*, *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013)

[5] *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, 29 FCC Rcd 12865 (2014) (*2014 Infrastructure Order*), erratum, 30 FCC Rcd 31 (2015), *aff'd*, *Montgomery County v. FCC*, 811 F.3d 121 (4th Cir. 2015).

infrastructure which leads to considerable confusion by local government staff over which rules/timelines to be followed in a specific application.[6]

Adding further fuel to this quagmire of regulations are the new definitions proposed in many of these state laws, which feature, almost universally, the following variations from federal definitions:

A. The elevation of a wireless infrastructure company, which does not provide wireless services, to the definition of a "wireless provider"[7];
B. The re-definition of the term "collocate" to mean the first installation of wireless equipment on a vertical structure, contrary to the definition in the *2014 Infrastructure Order*[8];
C. The elimination of discretionary approval by local government in permitting a "collocation" (as mutated by the new state law definitions) of certain infrastructure in public rights of way[9];
D. Creation of a new category of wireless facility, called a "small wireless facility" universally defined throughout these state laws as having antenna elements of less than 6 cubic feet and equipment components of less than 28 cubic feet, exclusive of a number of elements, and the exemption of most local zoning regulations from such defined facilities.
E. The removal of any requirement that the infrastructure provide wireless services, other than a "certification" by the applicant that the site will be activated within a specific timeframe but no enforcement provision regarding same.[10]

The almost universal abrogation of the definitions in these state statutes from those the Commission went into painstaking detail in the *2014 Infrastructure Order* serves solely to benefit the wireless infrastructure industry, which did not benefit from the *2014 Infrastructure Order* except where it already had a true wireless service provider prepared to utilize the proposed infrastructure. These new state laws open a "land rush" for speculator towers and infrastructure across multitudes of public rights of way, with minimal regulatory ability of local government to preclude each infrastructure provider from constructing its own facility (most of these regulations are silent on sharing or neutral hosting of equipment) in immediate proximity to other equipment (no minimum separation distances generally permitted), and engage in competitive bidding

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[6] See, e.g. Florida HB 687, Virginia SB 1282, Arizona HB 2365, North Carolina HB 310, Texas SB 1004. See also existing state statutes such as North Carolina §160A-400.53 and Florida §365.172(12).

[7] See Arizona Revised Statutes Title 9, Chapter 5, Article 8, Section 9-591 "Definitions". The same set of definitions appear in virtually all other similar bills in other states with minor variations.

[8] Arizona Revised Statutes Title 9, Chapter 5, Article 8, Section 9-591 - **"COLLOCATE" OR "COLLOCATION" MEANS TO INSTALL, MOUNT, MAINTAIN, MODIFY, OPERATE OR REPLACE WIRELESS FACILITIES ON, WITHIN OR ADJACENT TO A WIRELESS SUPPORT STRUCTURE OR UTILITY POLE.** This definition runs completely contrary to the "collocation" definition of the *2014 Infrastructure Order*, which defined it as the second and later addition of wireless equipment only after an initial review and approval of infrastructure for wireless equipment by local government.

[9] Florida HB 687, proposing the following language for F.S. 337.401(7)(c) – "Except as provided in this subsection, an authority may not prohibit, regulate, or charge for the collocation of small wireless facilities in the public rights-of-way."

[10] e.g. Florida HB 687, which requires certification that the site be used by a wireless services provider to provide wireless services "within 9 months after the date the application is approved".

with their competitors to secure true wireless service providers as tenants. All of which would be fine in our competitive "marketplace" economy, EXCEPT where the public lands which will be used for this infrastructure are (a) given away for virtually free to a profit-making venture and (b) the public ownership of these lands have minimal control over the location, design and number of this infrastructure. Local government has already begun to fight back against state legislation in this area[11] and when citizens realize what their state legislatures have foisted upon their local community, at the encouragement of the infrastructure industry, the fury visited upon legislators will only increase. CCI is already seeing this public anger in local government hearings, where it must be painstakingly explained to the public that local government's hands have been tied by state or federal laws on the matter. In CCI's opinion, it would be better if the Commission were to enact rules which preempt this mishmash of state legislation that bastardizes the language and definitions of the *2014 Infrastructure Order* and impose a reasonable, coherent and consistent set of rules after careful consideration and involvement of all stakeholders, including local government and the public in the issue. While the Commission's BDAC is a step in that direction, the observed feedback from local government to CCI is that the Committee membership suggests yet another forum where the wireless infrastructure industry controls the conversation.[12]

In the Notice of Inquiry portion of the *Wireless NPRM*, the Commission discusses reconciliation of the language in Sections 253(a) and 332(c)(7) of the Communications Act as it relates to state or local government regulation that has the effect of "prohibiting" telecommunications services. In connection therewith, CCI believes it is the purview of the Supreme Court, and not the Commission, to reconcile any differences between the various circuits relative to interpretation of the statutory language and in setting the burden of proof for the parties relative to same. CCI believes that local government must retain the ability to regulate on the basis of quantifiable aesthetic standards which are different in each community and which respect local governments' traditional role in controlling development via planning/zoning regulations. Communities in Arizona are very different than communities in Connecticut in both terrain, elevation, landscape, flora, and overall design aesthetic, and thus each should have the ability to ensure that wireless infrastructure development in its community, particularly infrastructure development on public property, be regulated in a manner that permits consistency with the balance of the community's design aesthetic. Should the Commission elect to provide more specific guidance on what constitutes permissible aesthetic concerns (rather than "generalized concerns"), it should do so bearing in mind the wide variations across the nation in topography, development, terrain, ecoregions, flora, etc.

In the *Wireline NPRM*, the Commission asks, beginning at paragraph 100, about enacting rules to preempt state and local law inhibiting the deployment of broadband

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[11] **"***Cleveland & 79 Ohio cities sue state, claiming wireless equipment law violates home rule"* Cleveland.com March 20, 2017. 80 Ohio jurisdictions have sued the State of Ohio over SB 331, a law similar in nature to those discussed infra.

[12] See e.g. comments of National League of Cities to Commissioner Clyburn in this docketed proceeding per ex-parte notice filed by same May 19, 2017.

deployment, including rules prohibiting moratoria, encouraging speedy approval processes and preventing "excessive" fees from being charged. These provisions would apply equally to wireless and wireless infrastructure. The Commission needs to aware of recent state legislation discussed above which has either passed into law or is pending wherein the wireless infrastructure industry has effectively seized control of public rights of way for virtually NO consideration whatsoever to conduct their profit-based businesses.[13] This industry constantly rails against "unfair" compensation provisions as a burden to deployment, yet companies within this industry continue to announce record dividends and profits[14] and the recent legislative efforts of its trade organizations have yielded state laws that strip any reasonable compensation provisions from local government for use of the public right of way and effectively hand over a public asset to a private industry for monetization. Other industries that utilize public rights of way use a compensation model to local governments for the use of that public asset[15]. What makes the wireless infrastructure industry so special that it cannot also provide such reasonable compensation, particularly when its members are earning annual profits in some instances nearing a BILLION dollars?[16] As noted above, BDAC may be a step in the right direction to develop a collaborative approach to developing methods to speed broadband deployment, but not if, as observed above, the perception remains that local government and public is underrepresented by BDAC. CCI has always advocated for a collaborative approach with the wireless services industry in siting infrastructure throughout the communities it represents. However, the wireless infrastructure industry and the wireless services industry are not necessarily aligned any longer in their interests[17] and the efforts of the wireless infrastructure industry to accelerate a "land rush" in an effort to secure inventory of sites to market to the wireless services industry runs contrary to a collaborative approach. This competitive economic model may be appropriate in other industries, but in the case of an industry often equated with other utilities, particularly relative to use of public lands for delivery of services, a more nuanced approach is necessary and should involve public-private collaboration at the local level, where decisions on local land use can be made by local representatives who are responsive to their citizens and where citizens' input is most often heard.

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[13] See footnote 6 above for examples of legislation which limits annual fees for right of way utilization by wireless infrastructure to nominal sums (generally in the range of $150-$250 dollars, although Texas bill limits fee to $20.00) and limits the fees payable to local government for application and review of this proposed development.

[14] "*American Tower (NYSE: AMT), made its debut on the Fortune 500 at No. 449 with revenues of $5.78B, profits of **$956M** and a total revenue increase by 21 percent over last year."* Inside Towers, Vol 5, Issue 113, June 9, 2017. www.insidetowers.com.

[15] E.g. franchise agreements, right of way fees, etc.

[16] See footnote 14 above.

[17] *See* 5 Themes From the WIA Show 2017 by Ken Schmidt, Inside Towers Vol 5, Issue 109, June 5, 2017 www.insidetowers.com

Conclusion

For the foregoing reasons, CCI favors the Commission asserting preemption over siting regulations enacted by state legislations with no experience in wireless siting matters and proposing standardized regulations to be used by all jurisdictions, after input from ALL stakeholders, including local government and citizens, and which will provide for customization by local jurisdictions within a set of defined parameters to accommodate for varying terrain, topography, flora, ecoclimates and other conditions between various communities within the United States. In particular, CCI endorses regulations that do not permit deployment infrastructure until an actual wireless services provider expresses a need for such infrastructure, consistent with preexisting federal statutory, regulatory and decisional law.

Respectfully Submitted

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